United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1150

To be argued by
MICHAEL B. MUKASEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1150

UNITED STATES OF AMERICA,

Appellee,

—v.—

STUART STEINBERG, WILLIAM CAPO, HOWARD KAYE and JAMES PARKER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Stuart Steinberg, William Capo, Howard Kaye and James Parker appeal from judgments of conviction entered March 18, 1975 as to Capo, Kaye and Parker, and April 8, 1975 as to Steinberg, in the Southern District of New York, following an eight-day jury trial before the Honorable Robert J. Ward, United States District Judge.

Indictment 73 Cr. 1095, filed December 5, 1973, charged Steinberg, Capo, Kaye, Parker, Michael Durst, John Perlman, Jeffrey Priesman, Susan Weinblatt, Stephen Effron, Stanley Nicastro and Jane Doe a/k/a "Sam" in Count One with conspiracy to distribute Schedule I, II and III controlled substances. Counts Two, Three and Four charged Steinberg, Capo and Durst with distribution of phencyclidine hydrochloride, a Schedule III controlled substance. Counts Five through Fourteen charged use of a communication facility in furtherance of the conspiracy charged in

Count One, in violation of 21 U.S.C. Section 843(b), with the following defendants named in the following counts:

COUNT	*DEFENDANTS*
Five	Parker, Jane Doe a/k/a "Sam"
Six	Priesman
Seven	Steinberg, Kaye
Eight	Steinberg, Nicastro
Nine	Steinberg, Capo, Durst
Ten	Steinberg, Capo, Durst
Eleven	Steinberg, Effron
Twelve	Steinberg, Effron
Thirteen	Weinblatt
Fourteen	Steinberg, Weinblatt

After pleas of guilty by defendants Perlman, Priesman, Weinblatt, Effron and Nicastro, the severance of the case against Jane Doe a/k/a "Sam" (identified as Sara Suzanne Werman) and the death of Durst, the case against Steinberg, Capo, Kaye and Parker on Counts One through Twelve and Fourteen of the indictment was tried beginning January 20, 1975. Each defendant was convicted on all counts in which he was named.

Steinberg was sentenced to concurrent terms of 18 months imprisonment, a $10,000 fine and three years special parole. Capo was committed for study pursuant to 18 U.S.C. Section 4208(b) and is to be resentenced. Kaye was sentenced concurrently to two months imprisonment and a $5,000 fine on each count of which he was convicted. Imposition of sentence on Parker was suspended and he was placed on probation for two years.

Steinberg is enlarged on bail pending appeal. Kaye has served his sentence. Capo is committed and serving his sentence.

Statement of Facts

The Government's Case

A. Preliminary Negotiations and Purchases of Drugs

On June 26, 1973 Special Agent Brian Noone was introduced by an informant to Stuart Steinberg at Steinberg's apartment as the representative of a man with money to invest in illicit drugs, particularly large amounts of "dust" (phencyclidine hydrochloride) (Tr. 56-60).* Steinberg gave Noone a sample of "dust" or "PCP" (GX 4B), said in response to an inquiry that there would be no problem getting ten pounds of the drug, mentioned that he had out-of-state sources in three states, and urged the agent to call him (Tr. 60-63). Lying on a living room table during this conversation were a scale and approximately $2,400 in $100 bills (Tr. 62).

The next day, Noone returned and bought 2 ounces of the drug for $2,400 (GX 5C; Tr. 134-145). Steinberg again urged him to call to arrange future deals (Tr. 64-67).

About two weeks later, on July 10, Noone returned to the apartment and proposed a 20-pound deal with a ½ pound sample to be bought first. Steinberg made a telephone call, spoke with someone named "Nicky" or "Mickey" and told Noone his source would soon arrive. He suggested the agent leave and return later (Tr. 73-75). Noone did as advised, and when he returned was shown a bag of white powder. He then suggested that Steinberg meet his "man" Artie to discuss a 20-pound deal in PCP. Steinberg was reluctant but yielded when told that Artie had $300,000 to invest (Tr. 75-77). Noone then left the apartment once more and returned with Special Agent Arthur Anderson, who he introduced as an investor who usually dealt in cocaine but would consider branching out into PCP. After Anderson

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* "Tr.." refers to the trial transcript, "GX" to Government exhibits.

confirmed his unfamiliarity with Steinberg's product by asking for an explanation of what "STP" was, Steinberg explained the drug's origin and use. From a hiding place, he then retrieved the bag Noone had seen earlier, explaining that he had put it there when Noone went to get Anderson because he feared a "rip-off." The bag, containing ½ pound of PCP, was sold to the agents for $8,800, and Steinberg discussed with them consummation of the 20 pound deal to which their ½ pound transaction was to have been a prelude. Steinberg said his source would come to the apartment and suggested Noone call later that evening (Tr. 77-80, 192-196; GX 7C).

Conversations overheard on a court-ordered wiretap later established that the drugs for the two and eight ounce deliveries to Agent Noone had been supplied by co-defendants Michael Durst and William Capo (Conversations 212, 214).*

Noone called later that evening. Steinberg said his people had been there and that he could supply as much as 50 pounds of PCP. Noone said he would be interested in a 50-pound deal (Tr. 80-81).

In telephone conversations between Noone and Steinberg on July 11, 16, 17 and 18, the deal was set for July 26 with 50 pounds of PCP to be delivered by Steinberg for $680,000 or $850 an ounce. The drug was to be delivered in three lots of 10 pounds, 20 pounds and 20 pounds, with the first lot to be exchanged for $136,000 in cash (Tr. 85-90).

During the July 18 conversation, Noone asked whether Steinberg had sources for cocaine as well. Steinberg said he had two and would "look into it" (Tr. 90).

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* Conversations recorded on a court ordered wiretap of Steinberg's two telephones were numbered as follows: One telephone was designated 1, the other 2. Each day of the tap was designated by letter, starting with A on the first day. Particular conversations on each day were then numbered sequentially. Thus, for example, the third conversation on telephone 2 on the fifth day of the tap would be conversation 2E3.

B. The Week of July 23

On July 23, 1973, following installation of wiretaps,* Noone called Steinberg and confirmed a 50-pound purchase of PCP. He asked also for a sample of the cocaine Steinberg could provide. Steinberg agreed (Conversation 2A1).

The following day, July 24, Steinberg spoke with one of his cocaine connections, David Stolzenberg,** who expected a "taste" or sample of the drug to arrive shortly and hoped to get between six and ten pounds of "rock" cocaine (Conversations 1B2, 2B3).

Later that day, Michael Durst, one of the two defendants who were providing Steinberg with PCP, called and left a message on Steinberg's automatic answering device that a "hold" would have to be put on the PCP deal (Conversation 2B4). The following day, July 25, Durst explained that his sources had been "busted" and therefore the deal was off. He noted that his partner, the defendant William Capo (Billy), was aware of the reversal (Conversation 2C1).

Steinberg immediately called Stolzenberg and, referring to notes he used to keep track of transactions, told him the cocaine deal would have to be moved up because the "crystal" (PCP) deal had fallen through. He added he

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* Following the above negotiations and purchases from Steinberg, the Government on July 20, 1973 secured an order pursuant to 18 U.S.C. Section 2518 for a 20-day wiretap on the two telephones in Steinberg's residence. The factual basis for the order was set forth in an affidavit of Agent Noone, dated July 18, 1973.

The wiretap was extended on August 20, 1973 for an additional 10 days based on Noone's affidavit of that date showing that Steinberg's efforts extended beyond PCP into cocaine, seconal, tuinal and hashish, and that his out-of-town sources included one in Chicago (Noone 8/23/73 affidavit pp. 4-5).

** Stolzenberg is no stranger to this Court. See *United States* v. *Falley*, 489 F.2d 33 (2d Cir. 1973) and *United States* v. *Stolzenberg*, 493 F.2d 53 (2d Cir. 1974).

United States Department of Justice

ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
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SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
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July 7, 1975

Clerk, United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Steinberg et al.,
Docket No. 75-1150

Dear Sir:

This is to advise the Court of the following typographical errors in the Government's Brief in the above case:

Page	Line	Corrected Text
6	6	proceed first, but then that Stolzenberg had found the
33	28	need not succeed before he can be convicted. Kaye was

Very truly yours,

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would not give Agent Noone the real reason for cancellation of the PCP deal but would simply say there had been a delay (Conversation 2C2). In subsequent conversations that day, Agents Noone and Anderson were told initially that the cocaine deal for a minimum of 10 pounds would proceed (Conversations 2C3, 2C7, 2C10). Stolzenberg, before product below standard and the deal therefore could not proceed (Conversation 2C3, 2C7, 2C10) Stolzenberg, before he found the cocaine would not pass muster, had contacted Kaye, who asked to purchase a small amount but promised bigger things. He was "not doing it for myself" and wanted "the best because I'm gonna have a ton for you to do." When Stolzenberg began an explanation of how their deal might be consummated, Kaye cut him short: "Davey, I've been in . . . it before" (Conversation 1C4).

Thursday, July 26, saw Steinberg trying to fill the gap created by the collapse of his PCP and cocaine deals, and lamenting his poor luck to codefendant Susan Weinblatt. *Steinberg*: ". . . Mickey [Durst] and Billy [Capo] had fallen through. Okay." *Susan*: "Yeah." *Steinberg*: "Okay. But David [Stolzenberg] was picking up the slack and everything looks very cool." *Susan*: "Yeah." *Steinberg*: "Okay, so he spoke to both me and Brian [Noone], and everything was cool. And then David showed up here at ten to twelve. And David fell through" (Conversation 2D1). Steinberg conferred also with codefendant James Parker who, after hearing from Steinberg that "both sources" had "dried up" conjectured that, "it may have to do with . . . yesterday's bust." Parker also conveyed the message that "Mitchell" had 17 of what Steinberg wanted and expected 10 more, and agreed to tell Mitchell that Steinberg was having difficulty obtaining what "Mitchell" wanted because of short supplies (Conversation 1D1).

One of the persons Steinberg contacted that day in his attempt to secure large quantities of drugs was Howard Kaye, who said he thought he could obtain as much as 50

pounds of cocaine in California: "It's the right thing, but it's gotta be a trip, okay?" A short time later, he informed Steinberg he had "two people who are calling back who can do it" but counselled caution. Steinberg told Kaye he could arrange a deal for either PCP or cocaine (Conversations 1D3, 1D4). Steinberg also tried to fill the gap by providing pills for the agents. After informing Stolzenberg that Kaye was attempting to obtain cocaine, Steinberg urged, "When you speak to [co-defendant Jeffrey] Priesman find out how many seconals or tuinals he can get me. I can do that, too. Big numbers. Big quantities. Find out the price—" He indicated he could sell Agent Noone all the pills Priesman could provide, and concluded, "Get me what Howard has [cocaine]. Get me what I was getting from Billy and Mickey, which Ricky has in California he told me [PCP]. So there's no problem with that now. I think I can do the whole thing. Get me what Priesman has [seconals and tuinals]. Get me anything, man, I can do it" (Conversation 1D7).

One transaction that was consummated that day involved the delivery of hashish oil to Steinberg's apartment. Parker called "Sam" (Sara Suzanne Werman) from Steinberg's apartment and informed one of the occupants of the room he was calling from that, "She has a quarter in New York for one and a quarter." "Sam" agreed to deliver the vial to Steinberg's apartment and pick up the money, apparently from Steinberg because Parker was to be out of the apartment when "Sam" arrived with the hashish oil. (Conversation 1D10; see also Conversation 1P1, in which Parker and Steinberg discuss a debt Parker owes Steinberg in connection with the transaction with "Sam"). Later that evening, Parker called and spoke initially with Steinberg, who told him that "Sam" had written him a note about obtaining "another oz" but that he could speak to "Sam" himself since she had not yet left the apartment. Parker and "Sam" then discussed a transaction for "another ounce" (Conversation 2D13). The following day, a conversation between

Steinberg and Stolzenberg confirmed that "Sam" had delivered hashish oil the night before, some of which was distributed along with a number of other drugs at Steinberg's party (Conversation 2E1).

Also the following day, Friday, July 27, Kaye advised Steinberg he could not obtain drugs and said he would speak further with Steinberg (Conversation 2E7).

C. The Week of July 30 and Thereafter

During the next week, Steinberg expanded his efforts to consummate a deal with Agent Noone, attempting to locate an alternative source of PCP, to obtain large quantities of pills, and to interest Noone in 60 pounds of hashish or an equal amount of marijuana to which he had obtained access through Durst and Capo.

On Monday Steinberg told Noone he would have to wait, and that the supply problems being encountered apparently were seasonal, summer's end being "usually a bad time of year" (Conversation 1H1).

On Tuesday, July 31, after Steinberg had agreed with Durst and Capo that neither side owed the other any money in connection with the PCP sold to Agent Noone (Conversations 212, 214), and after Kaye had again cautioned Steinberg that though the "crystal thing [PCP] is cool," he should use extreme caution in arranging cocaine deals (Conversation 218), Capo told Steinberg that he (Capo) had a possible new source in Chicago for the "first thing" (PCP) and would obtain a sample of the "second thing" (cocaine). Capo also confirmed his understanding that Steinberg was interested in obtaining pills (Conversation 112). Steinberg was informed by Stolzenberg that he could obtain through Priesman a mixture of 50,000 seconals, tuinals and quaaludes,* the precise number of each being

* Quaaludes were not a controlled substance at the time of the conversation, and the jury was so informed (Tr. 369).

uncertain (Conversation 2I9). Steinberg conveyed the results of the day's telephone conversations to Agent Noone, telling him of the new Chicago source for PCP and the availability of "downs"—seconals, tuinals and quaaludes (Conversation 2I10).

On Wednesday, August 1, Steinberg confirmed to Stolzenberg and then to Noone his interest in obtaining 40-50,000 pills and reselling them to Agent Noone and others (Conversations 2J2, 1J1, 1J2). He was also offered 60 pounds of hashish by Durst at $800 a pound (Conversation 2J10).

The next day, Steinberg offered the 60 pounds of hashish to Agent Noone—at $1,000 a pound (Conversation 2K1), an offer the agent eventually refused on the ground that his "man" was nervous about a recent arrest involving hashish (Conversations 2K6, 2K8). Durst said he also had 60 pounds of marijuana available (Conversation 2K8). That too was offered to Agent Noone (Conversation 2K12).

Meanwhile, efforts continued to cultivate the new PCP source Durst and Capo had found in Chicago (Conversations 2K3, 2K8, 2K12).

The hashish was delivered to Steinberg on Monday, August 6, by Durst, with Capo receiving the money from Steinberg (Conversations 1N8, 1N9, 2N18, 2N19, 2N22).

The following day Capo told Steinberg that a PCP sample would be brought from Chicago to New York (and therefore that the money Steinberg had lent Capo to travel to Chicago could be returned) (Conversations 2O7, 2K3), and Steinberg conveyed that information to Agent Noone (Conversation 1O2).

On Wednesday August 8, Steinberg's continued participation in Parker's hashish oil dealings with "Sam" Werman

was exposed when Steinberg and Parker discussed the latter's debt to Steinberg from "the thing with Sam" (Conversation 1P1). Later that day, Stephen Effron, then another of Steinberg's potential sources for cocaine (Conversations 2N11, 2P2), inquired about purchasing "oil"; Steinberg referred him to Parker who was to be at Steinberg's apartment that night (Conversation 2P6).

The same day Capo took an order from Steinberg for two pounds of marijuana and offered to sell Steinberg seconals and tuinals at a lower price than Steinberg could secure elsewhere (Conversation 1P7).

Also that day Steinberg sought to dispose of a pound of mediocre hashish he had been stuck with by selling it at cost to co-defendant Susan Weinblatt on the understanding that though it would not satisfy a demanding and sophisticated consumer, it could be sold "to someone in Queens you know . . . out there who's you know not looking for the greatest of the great, and can pay a very fair price, and they can deal and make double their money or triple" (Conversation 1P6).

On Thursday, August 9, Capo reported to Steinberg that the arrival of the PCP sample from Chicago was imminent. Steinberg exhorted Capo to bring him the sample unless it was "really terrible" since if the PCP was of even middling quality "we may be able to hoodwink them" (Conversation 2Q5).

D. Arrest of Parker and Kaye

During one of his conversations with "Sam" Parker had noted he had several telephone numbers of hers, including one in "Newton, Mass.", and would need a separate phone book to keep track of her. She suggested he write the numbers in pencil. He said he did (Conversation 1D10). When Parker was arrested, a telephone book was found

on his person showing a listing for "SAM WERMAN" with five telephone numbers, four of them in pencil, and one listing for a number in "Newtonville, Mass." (GX 9).

When Kaye was arrested he admitted knowing Steinberg but said he spoke with him only in Steinberg's capacity as a customer of the insurance company for which Kaye worked (Tr. 433-437).

The Defense Case

Howard Kaye called two psychiatrists. One, Dr. Maurice Friend, testified to Kaye's mental condition from 1963 to 1970. Though the doctor described a great deal about Kaye's disturbed psychological condition and drug use at that time, which was at least three years before the events giving rise to this case, he conceded that Kaye was able to appreciate the wrongfulness of *using* drugs and had neither facts nor opinions as to whether Kaye could conform his behavior to the requirements of law at that time (Tr. 489-518).

Dr. H. Willis, who treated Kaye during July 1973, testified that Kaye knew then that drug dealing was illegal and could refrain from doing so "most of the time" (Tr. 548-549).

Kaye also introduced a Selective Service record showing he had been excused from service in the armed forces for medical reasons, which may have included psychiatric as well as physical reasons (Tr. 557-566; Kaye Exhibit C).

Steinberg called Sandra Deiters who testified that during the summer of 1973 she saw Steinberg consume a variety of drugs, including PCP, seconal, tuinal and quaalude, and that she spent ten hours a day with him, four or five days a week (Tr. 570-575). On cross-examination, Miss Deiters conceded that she too would take drugs with Steinberg,

that she was living with Stolzenberg in her apartment during the summer of 1973, and that she had attempted to assure that Stolzenberg contact Agent Noone to complete a drug sale because, "David owed me money and I didn't care how he got it." She also identified the defendant Capo as the "Billy" of "Mickey and Billy," as Durst and Capo were often referred to in the taped conversations (Tr. 575-580).

Steinberg played conversations 2X1, 2N10 and 1N7. The first showed him in barely coherent conversation, apparently as a result of drug use, with one Alyce Samet, attempting to induce her to come to his apartment. The second showed Steinberg in conversation with Ricky Citrola, an informant in the case, expressing eagerness to meet with him, apparently to obtain PCP he believed Ricky was bringing from California. Whether the drug was for consumption or resale is not specified in that conversation. The third conversation, 1N7, was among Steinberg, Agent Noone and Citrola. It showed the drugs Steinberg expected Ricky to provide were for resale. It showed also that Noone urged Ricky, the informant, to exhort Steinberg to follow through on plans to obtain PCP from an alternative source in Chicago.

Finally, Steinberg called Dr. Solomon H. Snyder, a psychiatrist and pharmacologist, who testified on direct examination that consumption of PCP would tend to make a person suggestible, that that drug was psychologically addictive, that seconal, tuinal and quaalude also impaired mental processes, and that one could not necessarily tell from listening to a tape recorded voice whether a person was or was not under the influence of drugs (Tr. 594-612). Dr. Snyder testified on cross-examination that he had no idea of how much of any drug Steinberg consumed in the summer of 1973, had never examined Steinberg to determine the effect of drugs on him and had never been asked to (Tr. 612-617).

ARGUMENT

POINT I

The jury was properly instructed with respect to Steinberg's defenses of lack of intent and entrapment; in any event, he could hardly have been prejudiced by faulty instructions since the record supported neither defense.

Steinberg complains that the trial court's charge (i) "lumped" his lack of intent defense together with Kaye's insanity defense, to Steinberg's prejudice, and (ii) failed to instruct the jury that Steinberg's alleged drug intoxication was relevant to the inducement aspect of his entrapment defense. These complaints are as groundless as Steinberg's defenses themselves.

A. The Defense of Lack of Intent

Steinberg presented one witness who testified that he took a variety of drugs during the summer of 1973, including PCP, seconal, tuinal and quaalude, but did not testify that at any given time or before any given conversation or transaction he had taken any or all of those drugs (Tr. 570-575), and admitted that she too had been taking drugs at the same time (Tr. 576) and had urged co-conspirator David Stolzenberg, who lived with her, to complete a drug transaction because, "David owed me money and I didn't care how he got it" (Tr. 578). He presented an expert witness who testified that consumption of PCP would tend to make a person suggestible, or psychotic, or subject to hallucinations, depending on the amount consumed, that that drug was psychologically addictive and that seconal, tuinal and quaalude also impaired mental processes (Tr. 594-602, 607-610A), though the expert had no direct knowledge of how much of any drug Steinberg had taken during

the summer of 1973, offered no testimony on how Steinberg would describe the effect of the drugs he took, though such a description would be relevant in determining how the drugs affected him, had never examined Steinberg or been asked to, and had no testimony on the effect of a combination of drugs on anyone (Tr. 612-617).

Despite these gaping holes in Steinberg's proof, the Court charged the jury, once in general terms and once, contrary to Steinberg's claim (Steinberg Brief, p. 19), mentioning Steinberg by name, that if they found Steinberg was under the influence of drugs at any time they could find he then lacked specific intent. Thus the jury was told first,

> "If you find that a defendant was under the influence of drugs at the time of any acts or during any conversation, either in person or by telephone, you would be justified in concluding that there was a reasonable doubt as to whether the defendant acted or spoke intentionally, at least on that occasion" (Tr. 844).

Then, lest the point be lost, the jury was told specifically:

> "Again, in determining whether *the defendant Steinberg* had the specific intent to distribute a controlled substance, you should consider his mental and physical condition at the time.
>
> If because of *Steinberg's* own drug use and the consequence [sic] effect of such drugs on his mental and emotional state, you find a reasonable doubt that he was capable of forming the specific intent to distribute a controlled substance at the time of the transaction, you must acquit him" (Tr. 852-853) (emphasis added).

Undeniably, the jury was also told—erroneously—that Steinberg along with Kaye had advanced a classic insanity defense (Tr. 856-858). But the jury was never told, nor could they reasonably have inferred, that Steinberg's only defense was insanity. Rather, that was but one of three defenses specifically attributed to Steinberg, the other two being lack of intent and entrapment.

Moreover, even if the trial judge had somehow by his charge on insanity weakened the clear instruction given on Steinberg's defense of lack of specific intent, Steinberg could not complain, for he was not entitled to the instruction on specific intent. While there seems little doubt that in a proper case a defendant may introduce evidence of intoxication to show that he lacked the specific intent to commit a crime requiring such intent, and may request a charge embodying that defense, see, *e.g.*, *United States* v. *Brawner*, 471 F.2d 969, 998-1002 (D.C. Cir. 1972), Steinberg has cited no case in which such a defense is suggested for a continuing offense requiring extensive planning, such as the offenses charged here. Indeed, the cases cited by Steinberg (Steinberg Brief pp. 16-17) uniformly involve single-act offenses. *Tucker* v. *United States*, 151 U.S. 164 (1893), *Hopt* v. *Utah*, 104 U.S. 631 (1881), *United States* v. *Brawner*, *supra*, and *Battalino* v. *People*, 118 Colo. 587, 199 P.2d 897 (1948) (murder); *United States* v. *Nix* 501 F.2d 516 (7th Cir. 1974) (escape); *Womack* v. *United States*, 336 F.2d 959 (D.C. Cir. 1964) and *Heideman* v. *United States*, 259 F.2d 943 (D.C. Cir. 1958), *cert. denied*, 359 U.S. 959 (1959) (robbery). See also *United States* v. *Hartfield*, 513 F.2d 254 (9th Cir. 1975) and *Caples* v. *United States*, 391 F.2d 1018 (5th Cir. 1968) (bank robbery); *Allen* v. *United States*, 239 F.2d 172 (6th Cir. 1956) (entering post office with intent to rob); *Edwards* v. *United States*, 172 F.2d 884 (D.C. Cir. 1949) (breaking and entering). Indeed, to the extent the language of the cases cited bears on the matter, it suggests that the defense is not appropriate where a long-term course of behavior is involved

and a defendant cannot establish that he was intoxicated for the entire period. Thus the courts took pains to note, in *Tucker*, the *absence* of advance planning (to show that an intoxication defense would have been legitimate) and, in *Heideman*, the *presence* of advance planning (to show that that defense could not have been believed by any reasonable jury).

Thus it is in no sense "well-established" (Steinberg Brief p. 17) that the intoxication defense should have been available at all to Steinberg, given the Government's proof, regardless of the evidence he introduced. Rather, in view of the complete absence of evidence as to Steinberg's drug ingestion at any particular time, and the particular effect on Steinberg at any time of any drug he took, it *is* clear that a charge on lack of intent need not have been given at all. *United States* v. *Clark*, 498 F.2d 535, 537 (2d Cir. 1974), holds squarely that a defendant who introduces no evidence to show his drug intoxication at the time he obtained a controlled substance, or at the time his intent to distribute was formed, is not entitled to invoke a defense based on lack of intent to distribute due to drug intoxication. Regardless, such a charge was given, as was a charge on insanity. It would seem a refinement of absurdity for Steinberg to find prejudice in a purely hypothetical confusion between a defense he failed to establish and a defense he failed to invoke.

B. The Defense of Entrapment

Steinberg claims error in the Court's entrapment charge for its failure to advise the jury that they could consider Steinberg's alleged drug intoxication, with its allegedly resultant suggestibility, on the issue of whether he had shown inducement by Government agents such that the Government was then bound to show predisposition, the theory apparently being that since Steinberg was highly suggestible, what would otherwise be mere solicitation rises to the level of inducement.

Even if Steinberg's novel interpretation of the inducement aspect of the entrapment charge was not given proper emphasis below, his claim that there was accordingly a prejudicial defect in the instruction to the jury on entrapment is frivolous for at least three reasons.

First, there was no evidence that Steinberg was drug intoxicated during any given drug transaction or conversation with the agents.

Second, there was no evidence that any drug or combination of drugs he was taking made *Steinberg* unusually susceptible to suggestion. To the extent there is evidence, it points the other way—thus, for example, the very first recorded telephone conversation played at trial, between Steinberg and Agent Noone, in which the agent sought to change the terms of delivery of PCP and Steinberg flatly refused even to approach his suppliers with Noone's proposed change, and in which the agent sought cocaine samples from both of Steinberg's sources and was told only one could be obtained (Conversation 2A1).

Third, the record bristled with evidence of Steinberg's predisposition, and he offered no evidence to contradict it. At Noone's first meeting with Steinberg there was a scale and $2,400 in cash lying on a table.* Following the collapse of the 50-pound PCP deal due to the arrest of Durst's and Capo's source, Steinberg made it clear *he* wished to recoup by consummating a cocaine deal, telling Stolzenberg, "He blew it. That's why I gotta make up for it on this. And I want to try to get the same bread on this as I was gonna get on the other one," adding that he was "gonna make a quarter of a million on the other one" (Conversation 2C2). Indeed, in the same conversation, Steinberg referred to

* Steinberg's claims that the agents had no knowledge of Steinberg's prior dealings, and that there was no evidence of them, is therefore false (Steinberg Brief at 24).

records he used to keep track of transactions. Finally,* Steinberg learned of opportunities to secure pills and hashish and, without any request from Noone, offered those items (Conversations 1I2, 2I9, 2I10, 2J10, 2K1). Virtually all of Steinberg's activities, including the recorded conversations with his associates, bespoke a long-term involvement in a broad distribution of illicit substances which predated the arrival of the agents at the scene. This evidence, unrebutted, shows that Steinberg "was, in the words of *Sherman* [v. *United States*, 356 U.S. 369 (1958)], not an 'unwary innocent' but an 'unwary criminal'" *United States* v. *Russell*, 411 U.S. 423, 436 (1972). Under such circumstances, Steinberg was not entitled to an entrapment charge at all. *United States* v. *Miley*, 513 F.2d 1171, 1202 (2d Cir. 1975) and cases there cited.

Of course, all the above points assume arguendo the validity of Steinberg's low-threshold-of-inducement theory. Yet that theory itself is insubstantial. The showing of inducement a defendant is required to make is a showing of *Government* behavior that is more aggressive than merely giving the defendant an opportunity to commit the offense, more aggressive than solicitation. *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932); *United States* v. *Berry*, 362 F.2d 756, 758 (2d Cir. 1966). Since a defendant's drug use will not rebut but merely explain the Government's showing of his predisposition, *United States* v. *Henry*, 417 F.2d 267, 270 (2d Cir. 1969), *cert. denied*, 397 U.S. 953 (1970), it can hardly be relevant to the issue of inducement, which focuses on the character of the *Government's* action and not on the defendant, as predisposition does. The invalidity

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* Steinberg's claim that Government agents taunted Steinberg with PCP and supplied him with it is false and scurrilous (Steinberg Brief at 11, 23, 24). One of the conversations Steinberg himself introduced showed that the PCP he was fairly begging for from the informant was for resale (Conversation 1N7). Thus Steinberg was tantalized by the one thing that occupied his attention from the outset: money.

of Steinberg's "low threshold" theory of inducement thus collapses and with it any proper claim of entrapment, given the absence of evidence of inducement, on which the burden of proof was Steinberg's. *United States* v. *Berry, supra; United States* v. *Sherman,* 200 F.2d 880, 882 (2d Cir. 1952).

In sum, Steinberg's defenses of lack of intent and entrapment assumed in the Court's charge a dignity and a dimension beyond anything justified by the facts of this case or the law of any other. He has no cause for complaint here.

POINT II

The application and order to tap Steinberg's telephones met statutory and constitutional requirements.

A. The application fulfilled the requirements of 18 U.S.C. Section 2518(1)(c).

Steinberg and Capo argue that the wiretap evidence introduced at trial must be suppressed for failure by the Government in its wiretap application to satisfy the statutory requirement of "a full and complete statement as to whether or not other investigative procedures had been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. Section 2518(1)(c). Both further suggest that facts developed at or after trial contradict the facts set forth in the application, and Capo recommends a hearing to resolve the alleged contradictions. Neither claim is supported by the record below or by the cases construing the statute.

At the time the Government applied for the wiretap, a DEA undercover agent had purchased more than three quarters of a pound of PCP from Steinberg for more than

$10,000 in two transactions within two weeks, and was then engaged in negotiations to buy 50 pounds of PCP from Steinberg with 20 pounds promised for quick delivery (Noone 7/18/73 affidavit, paragraphs 5-7, 9). Moreover, Steinberg had told the agent that he could supply unlimited quantities of the drug from an out-of-state laboratory (Noone 7/18/73 affidavit, paragraph 10B). That record, by any reasonable standard, fully qualified Steinberg as a major dealer in the drug.* In addition, the agent had seen Steinberg rely repeatedly on the telephones for which wiretap authorization was requested in conducting his drug business, both in the contact between the agent and Steinberg, and the contact between Steinberg and his "people" (Noone 7/18/73 affidavit, paragraphs 4-9).

Contrary to Steinberg's artful rendering of the agent's affidavit, Noone did not "confess" that he "did not wish to meet" Steinberg's "people" (Steinberg Brief at 33).** The full quotation from the affidavit, referring to a telephone call Steinberg made in Noone's presence on July 10, 1973, is as follows: "During the course of his conversation, Steinberg informed 'his people' that I would not be there when they arrived, and that he was aware that they did not want to meet me and that I did not wish to meet them" (Noone 7/18/73 Affidavit, paragraph 7). That statement

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* Capo taxes (Capo Brief at 18 n. 2) the agent for referring to Steinberg in his affidavit as a narcotics dealer, claiming that he "conveniently" overlooked the fact that Steinberg, to his knowledge, was not dealing in a narcotic but rather in a non-narcotic drug. Capo, no doubt inadvertently, has overlooked the fact that on the very day of the affidavit Steinberg had told Noone he would "look into" two sources of cocaine (Tr. 90), a narcotic drug. Further, Capo offers nothing to suggest that the covert behavior of those who deal in non-narcotic illegal controlled substances differs in any way significant from the covert behavior of those who deal in illegal narcotic controlled substances.

** Capo does not distort this section of Noone's affidavit; he simply neglects to mention it.

was *Steinberg's*, not the agent's. It shows, at a minimum, that regardless of the agent's preference, Steinberg's "people" did not want to meet him and Steinberg supported their point of view.

Thus, at very least, the Government's application showed, through Agent Noone's affidavit, that Steinberg relied heavily on the telephone in conducting his necessarily clandestine drug business, that Steinberg had already *delivered* more than $10,000 worth of drugs and was negotiating to sell many times that, and that he and his "people" were wary of introductions. Contrary to the attempts by Steinberg (Steinberg Brief at 29-30, 33 fn.) and his co-defendant (Capo Brief at 19, 24) to style him a *naif* incapable of "covert" behavior, the evidence as of the date of the application showed him to be a substantial dealer to whom it was entirely appropriate for the agent to apply his usual experience with such individuals—that their activities resist detection by non-wiretap methods (Noone 7/18/73 affidavit, paragraph 10, 11B).

That affidavit fully satisfied the showing the Government must make to establish the impracticability of using other investigative methods to root out a fully developed drug distribution network. Contrary to defendants' implicit suggestions that Noone should have insisted on meeting Steinberg's suppliers, thereby probably alerting either Steinberg or them to the fact that Noone was not himself a wary narcotics trafficker but rather an agent, the Government need not, by the terms of the statute, try *any* alternative method of investigation. 18 U.S.C. Section 2518 (1)(c). The legislative history of that section makes explicit what is already obvious from the statutory text: "Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely [citation omitted]. What the provision envisions is that the showing be tested in a practical and commonsense fashion [citation omitted]." S. Rep. No. 1097, 90th Cong., 2d Sess, 1968 U.S. CODE CONG. AND ADMIN. NEWS 2190. As the Supreme

Court noted in *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12 (1974), Section 2518(1)(c) "is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would *suffice* to expose the crime" (emphasis added).

In view of that background, it is hardly surprising that Courts have concluded the Government's burden in showing impracticability of other investigative methods is "not a great one." *United States* v. *Staino*, 358 F. Supp. 852, 857 (E.D. Pa. 1973); *United States* v. *Whitaker*, 343 F. Supp. 358, 363 (E.D. Pa. 1972), *reversed on other grounds*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 950 (1973); *United States* v. *Askins*, 351 F. Supp. 408, 414 (D. Md. 1972). In fact, it has been held that regular reliance on the telephone coupled with distant contacts for drugs "could reasonably lead agents, attorneys, and this Court as well, to the conclusion that the operation was keyed to the telephone to such a great extent that further investigation would be futile, absent interception of the [defendant's] calls." *United States* v. *Falcone*, 364 F. Supp. 877, 889 (D.N.J. 1973), *aff'd*, 500 F.2d 1401 (3d Cir. 1974).

As another Court held in *United States* v. *King*, 335 F. Supp. 523, 535 (S.D. Cal. 1971), *modified on other grounds*, 478 F.2d 494 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973): "The purpose of Section 2518(1)(c) is to inform the authorizing judge of the difficulties inhering in the use of conventional techniques. Since the peculiar nature of this case, involving as it does an allegedly large-scale conspiracy with many members in many locations, serves to make these difficulties self-evident, [the agent's affidavit] seems a reasonable, if not artful, compliance with the statute. 'In matters of this kind substantial compliance is all that is required.' *United States* v. *Freeman*, 144 F. Supp. 669, 670 (D.D.C. 1956)." See also, *United States* v. *Lanza*, 356 F. Supp. 27, 30 (M.D. Fla. 1973). Similarly, in this case, which involved a large-scale dealer with out-of-town suppliers who shunned meeting outsiders, a dealer who

relied heavily on the telephone, it was and is obvious that conventional methods would not "suffice to expose the crime." *United States* v. *Kahn, supra.* Indeed, two judges so found, findings which themselves weigh in the Government's favor here. *Cf. United States* v. *Bynum*, 360 F. Supp. 400, 415 (S.D.N.Y.), *aff'd*, 485 F.2d 490 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974); *United States* v. *Becker*, 334 F. Supp. 546, 549 (S.D.N.Y. 1971) (Weinfeld, *J.*), *affirmed*, 461 F.2d 230 (2d Cir. 1972), *vacated and remanded on other grounds*, 417 U.S. 903 (1974).

Steinberg finds *United States* v. *Curreri*, 388 F. Supp. 607 (D. Md. 1974) "directly in point" (Steinberg Brief at 36), yet in that case, unlike the case at bar, there was no suggestion that participants in the conspiracy, if there was one, were at all wary of meeting with outsiders. Further, the Court noted specifically that not only did the affidavit in support of the wiretap fail to disclose a large scale conspiracy, but there was a distinct possibility that the scope of the conspiracy did not even meet Federal jurisdictional standards. 388 F. Supp. at 622. In the case at bar, Steinberg had already delivered more than $10,000 worth of drugs and was negotiating to deliver additional hundreds of thousands of dollars worth. The large scale of Steinberg's operation was apparent from the agent's affidavit.

Capo argues that the wiretap affidavits do not show "any attempt to use traditional methods of surveillance of both Steinberg and his apartment" (Capo Brief at 19), overlooking the fact that the statute by its terms requires no such attempt. He deduces optimistically that "that procedure was likely to prove fruitful here since, according to Noone's affidavit, his dealings with Steinberg on July 10, 1973, virtually pinpointed the time when the supplier, drugs in hand, was scheduled to arrive at Steinberg's apartment" (*Ibid.*), overlooking the fact that surveillance was maintained and proved unsuccessful (Tr. 124-125, 131-132). Nor

is any consideration given to the plain fact that visual surveillance can, at best, show nothing more than the coming and going of unidentified people and thereby provide no more than circumstantial support for information secured from other sources. See *United States* v. *Barry*, Dkt. No. 75-1060 (2d Cir., June 18, 1975), slip op. at 4127-28; *United States* v. *Cirillo*, 499 F.2d 872, 884-85 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974).

Overlooked as well by both defendants is the specific proscription in Title 21 of use of communications facilities in furtherance of illegal drug trafficking, 21 U.S.C. Section 843(b), a provision that formed the basis for several counts of the indictment. As the Court noted in *United States* v. *Leta*, 332 F. Supp. 1357, 1363 (M.D. Pa. 1971), *rev'd on other grounds*, 467 F.2d 647 (3d Cir. 1972) the "tapping of wires is particularly apposite where wire communications is an ingredient of the crime." It is hard to imagine how such a crime might be investigated except through the use of a wiretap.

Struggling to overcome the sufficiency of the agent's affidavit, Capo urges the Court to go beyond it, claiming that the record below shows the agent's sworn representations were false, probably intentionally so (Capo Brief at 25). Again, the record belies the claim.

First, it is suggested, simply on the basis of an assertion by counsel below, that a tape recording "squarely" contradicts the agent's claim that he had no undercover access to Steinberg's supplier by showing that "Steinberg specifically offered to introduce Noone to his sources" (Capo Brief at 24). The tape (GX 3545), a cassette including Noone's July 18 conversation with Steinberg, shows it was Steinberg who said neither side wished to meet the other, Noone who agreed, and Steinberg who reiterated that his sources did not wish to meet Noone. As noted above, it cannot seriously be argued that Noone should

instead have demanded to meet Steinberg's suppliers, thereby alerting him and them to his true identity.

Similarly, Capo claims (Capo Brief at 10) that Noone "conceded" on cross-examination that on July 18 Steinberg had agreed to introduce the agent "to his supplier but that he had declined the opportunity", citing page 125 of the record. Yet the remainder of the agent's testimony shows that he had declined the opportunity because he was expected on the occasion of such a meeting to be carrying $136,000 in cash (Tr. 127). In the light not only of common sense but of a specific incident a scant nine months before in which an agent had been killed and another permanently paralyzed in similar circumstances, *United States* v. *Rivera*, 513 F.2d 519 (2d Cir. 1975), Noone's reluctance was fully justified and specifically within the category of "too dangerous" investigative procedures recognized in 18 U.S.C. Section 2518(3)(d). Moreover, any interpretation of Noone's testimony of the sort for which Capo contends must be rejected in light of the tape recording of the conversation about which Noone was testifying (GX 3545) in which Steinberg makes clear, prior to any statement by Noone, that his suppliers did not want to meet Noone.

Again, Capo points to a segment of a conversation between Steinberg and co-defendant Susan Weinblatt to sustain the claim that the Government could have relied on its informant, Ricky Citrola, to learn who Steinberg's drug suppliers were and presumably to provide introductions to them (Capo Brief at 11-12, 25-26). Yet in that very conversation Steinberg makes it clear that Citrola had nothing to do with obtaining goods from Steinberg's drug suppliers, but rather that Citrola introduced Steinberg to customers with money and Steinberg obtained the drugs:

> "*Steinberg*: Because Ricky's people. Ricky has the people with the money.

Weinblatt: Right.

Steinberg: Okay.

Weinblatt: Right.

Steinberg: Whether it's coke, crystal or anything else doesn't matter. *I'm supposed to get the goods"* (Conversation 201) (emphasis added).

Once more, Capo argues that though the affidavit said nothing about visual surveillance, "the record indicates that successful visual surveillance was conducted" (Capo Brief at 26). Reference is made to the complaint filed against Capo on September 18, 1973 by Special Agent Ronald L. Jordison, which refers to "surveillance . . . by Special Agents of the . . ." DEA of Capo and Durst entering and later leaving Steinberg's building on July 10, 1973, the suggestion being that the identity of Capo and Durst were known to the DEA on July 10. As noted, the record indicates this theory is wrong. There was direct testimony that the July surveillance did not disclose the identity of those being observed (Tr. 124-125, 131-132), and there is nothing in the record that suggests that, when he executed his affidavit eight days later, Noone—or any other agent for that matter—knew their identity or their mission on July 10. Capo's *ex post facto* extrapolations from the record, not argued below, are precisely of the sort which this Court found inadequate to warrant a hearing in a significantly similar context in *Williams* v. *United States*, 503 F.2d 995, 998 (2d Cir. 1974).

Neither Steinberg nor Capo has adduced any evidence that the statements in Noone's affidavit are untrue. Thus neither suppression nor the hearing requested by Capo is warranted, since a hearing is appropriate only upon "an initial showing of falsehood or other imposition" on the finder of probable cause, *United States* v. *Dunnings*, 425 F.2d 836, 840 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002

(1970), and not only has Capo failed to make such a showing but all the evidence sustains the truthfulness of Noone's affidavit.

B. The periods of interception authorized in the original and renewal orders met both statutory and constitutional requirements.

Steinberg claims that the original and extension orders violated statutory standards because they failed to provide that surveillance cease with the first narcotics-related conversation and offended Fourth Amendment standards by being overly broad. Neither claim withstands scrutiny.

1. Statutory requirements were fully met.

The statute clearly contemplates that certain wiretaps may relate to investigations dealing with individual events or meetings, while others may relate to investigations dealing with extensive patterns of criminal behavior, such as Steinberg's. It recognizes, by its very terms, that the nature of certain investigations requires interception beyond one conversation: "If the *nature of the investigation* is such that the authorization for interception should not automatically terminate when the described type of conversation has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter," should appear in the affidavit. 18 U.S.C. Section 2518(1)(d) (emphasis added).

The legislative history, again, merely particularizes the obvious: "Where it is necessary to obtain coverage to [sic] only one meeting, the order should not authorize additional surveillance [citations omitted]. Where a course of conduct embracing multiple parties and extending over a period of time is involved the order may properly authorize proportionately longer surveillance, but in no event for longer than 30 days, unless extensions are granted [citations omitted]." 1968 U.S. CODE CONG. AND ADMIN. NEWS 2190.

The investigation of Stuart Steinberg was clearly of the "course of conduct" variety, requiring longer surveillance. As it was, the initial order sought and obtained authorized surveillance for only 20 of the 30 days permitted by the statute. Agent Noone's affidavit of July 18, 1973 showed a series of transactions over a two-week period in which Steinberg sold him more than $10,000 worth of drugs, with negotiations continuing toward the sale of many times that amount, and showed that Steinberg regularly used the telephone in his illicit drug business (Noone affidavit of July 18, 1973, paragraphs 5-9). Under those circumstances, one can only wonder at Steinberg's claim that the application did not "contain a particular description of facts establishing probable cause to believe that additional communications of the type described would occur thereafter" (Steinberg Brief at p. 38), and demand what else could be shown. Indeed, given the facts set forth in Agent Noone's July 18, 1973 affidavit, it would have been miraculous if additional communications would not occur.*

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* Steinberg asserts that the July 20, 1973 and August 20, 1973 applications did not request interception beyond the first communication of the type sought, and apparently concludes that the orders therefore went beyond the Government's request in granting permission for interception beyond the first communication. He forgets that it was the Government that submitted the text of the orders, which were just as much a part of the Government's "request" as the supporting affidavits, which made clear the need for a continuing interception.

His claim that the August 20, 1973 extension order "contained no termination statement at all" (Steinberg Brief at 39) is simply false. Judge Wyatt's August 20, 1973 order ends with the following paragraph:

> IT IS FURTHER ORDERED that all conditions, directives and requirements of said orders of the Honorable Charles E. Stewart Jr., be continued in force during the extension provided for hereby."

Judge Stewart's order directed termination when its objectives were attained. It would seem obvious that Judge Wyatt's order was to terminate when and if its objectives were achieved, or at the end of 10 days, whichever first occurred.

As this Circuit has repeatedly held, wiretaps involving patterns of behavior such as Steinberg's need not terminate with the first crime-related conversation. *United States* v. *Poeta*, 455 F.2d 117, 120 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972); *United States* v. *Tortorello*, 480 F.2d 764, 780-781 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973).

2. The original and extension orders met Fourth Amendment requirements.

The defendant Steinberg attacks the original and extension orders in this case as roving or blank warrants of the sort condemned in *Berger* v. *New York*, 388 U.S. 41 (1967) and *Katz* v. *United States*, 389 U.S. 347 (1967). His analysis and authorities are the same as those used by the District Court in *United States* v. *Whitaker*, 343 F. Supp. 358, 363-368 (E.D. Pa. 1972) in holding that the wiretap statute was unconstitutional. That analysis was rejected in the Circuit where it originated, *United States* v. *Whitaker*, 474 F.2d 1246 (3d Cir.), *cert. denied*, 412 U.S. 950 (1973), reversing 343 F. Supp. 358, *supra*. That discredited reasoning is no more valid when applied to a particular order, as it is here, that when applied to the statute as a whole, as it was in *Whitaker, supra*.

United States v. *Tortorello, supra*, is dispositive in this Circuit. The defendants in that case challenged on statutory and Fourth Amendment grounds an order that mentioned as subject offenses "the acquisition and distribution of stolen negotiable instruments and documents and acts or crimes in furtherance of such acquisition and distribution" and authorized the interception of conversations "relative to the commission" of these acts and crimes, which conversations would "constitute evidence of the crimes of Burglary, Forgery as a Felony, Possession of Forged Instruments as a Felony, Possession of Forgery Devices, Grand Larceny in the First Degree, Criminal Possession in the First Degree and conspiracy to commit said crimes." This

Court sustained the order, noting that under the statute, "The order must be broad enough to allow interception of *any statements concerning a specified pattern of crime.*" 480 F.2d at 780 (emphasis added).

Orders aimed at discovering the manner in which a defendant conducts his drug dealing are no less precise than the order attacked in *Tortorello.* As such, the orders in this case were valid under the statute and under the Fourth Amendment.

POINT III

Counts 7 through 12 and 14 of the indictment charge crimes within the reach of 21 U.S.C. Section 843(b).

Steinberg applies the following syllogism to show that Counts 7 through 12 and 14 of the indictment do not charge crimes under 21 U.S.C. Section 843(b): Those counts charge use of the telephone to commit, cause and facilitate the commission of "the conspiracy set forth in Count One . . ." Section 843(b) makes it unlawful to use any communication facility to commit, cause or facilitate the commission of "any act or acts constituting a felony" under Sections 801-966 of Title 21. The gist of the offense of conspiracy is the agreement to violate the law, rather than the overt act to accomplish a goal of the conspiracy, which may itself be legal. Since the statute forbids use of a communication facility to commit an act, and since a conspiracy is not an act, a count which charges use of a telephone to commit conspiracy charges no crime.

The argument simply cannot withstand analysis.

First, of course, is the mischief lurking in the syllogism itself. To say, as courts have, that the gist of conspiracy is agreement, see, *e.g., United States* v. *Armone,* 363 F.2d

385, 400 (2d Cir.), *cert. denied,* 385 U.S. 957 (1966), and that the overt act used to prove the existence of a conspiracy need not in itself be illegal, *Braverman* v. *United States,* 317 U.S. 49, 53 (1942), is not to say that an "agreement" is not itself an "act". Applying the argot of conspiracy uniformly, it would seem that the agreement is the covert act whose existence is proved by some overt act, a principal purpose of which "is simply to manifest that the conspiracy is at work, *Carlson* v. *United States,* 187 F.2d 366, 370 [(10th Cir.), *cert. denied,* 341 U.S. 940 (1951)], and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence". *Yates* v. *United States,* 354 U.S. 298 334 (1957). In fact, Section 846, like its predecessor, 21 U.S.C. § 174, does not by its terms require proof of an overt act. See *Irizarry* v. *United States,* 508 F.2d 960, 966 n. 5a (2d Cir. 1974). It simply forbids conspiracy to violate other sections of Title 21. Since Steinberg has presented no authority for the proposition that an agreement is not an act, his syllogism collapses.

Moreover, even if a conspiracy were said to be not technically an act in the sense that it is merely a criminal agreement, still the existence of that agreement, as here, frequently arises from the concerted acts of a group of individuals toward an illegal goal commonly shared. *Cf. United States* v. *Sperling,* 506 F.2d 1323, 1341-1342 (2d Cir. 1974), *cert. denied,* — U.S. —, 43 U.S.L.W. 3474 (March 3, 1975); *United States* v. *Miley, supra,* 513 F.2d at 1208. Since this aggregation of conduct is clearly "acts constituting a felony"—conspiracy, and indeed here was primarily use of the telephone to arrange narcotics transactions, there is little room for a claim that Section 843(b) by its express terms does not apply.

But beyond this structural defect in Steinberg's argument lies a more basic objection. The result Steinberg asks is entirely discordant with the general purpose of the statute,

which "is a more important aid to the meaning than any rule which grammar or formal logic may lay down." *United States* v. *Whitridge*, 197 U.S. 135, 143 (1905) (Holmes, *J.*). Steinberg would have this Court rule that though Congress condemned equally conspiracy and substantive offenses under Title 21, providing equal penalties for each, 21 U.S.C. Section 846, it chose for some reason nowhere apparent in the statute or its legislative history to forbid use of the telephone in aid of a substantive offense but not in aid of a conspiracy. That was not what Congress, or that part of it most aware of such things, thought it was doing. Rather, Congress was told that this section "makes it unlawful for any person to knowingly or intentionally use any communication facility in committing or facilitating the commission of a felony under this title or Title III," which includes the conspiracy section. 1970 U.S. CODE CONG. AND ADMIN. NEWS, 4616. Thus the legislative history shows Section 843(b) was intended to include use of the telephone in aid of a conspiracy.

POINT IV

There was enough evidence to convict Kaye.

Howard Kaye argues that the evidence was not sufficient to show he was a co-conspirator. The record does not sustain him.

On Thursday, July 26, Steinberg called Kaye, who said he thought he could obtain as much as 50 pounds of cocaine in California and praised the quality of the drug: "It's the right thing . . ." (Conversation 1D3). A short time later Kaye reported to Steinberg that he had "two people calling back . . . who can do it" and discussed who could make the necessary flight to the West Coast, Kaye suggesting "a kid like Merv" (Conversation 1D4).

United States Department of Justice

ADDRESS REPLY TO "UNITED STATES ATTORNEY" AND REFER TO INITIALS AND NUMBER

MBM:mcc

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

July 7, 1975

Clerk, United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Steinberg et al.,
Docket No. 75-1150

Dear Sir:

This is to advise the Court of the following typographical errors in the Government's Brief in the above case:

Page	Line	Corrected Text
6	6	proceed first, but then that Stolzenberg had found the
33	28	need not succeed before he can be convicted. Kaye was

Very truly yours,

PAUL J. CURRAN
United States Attorney

By /s/ Michael B. Mukasey
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Assistant United States Attorney
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Steinberg then told co-conspirator David Stolzenberg that Kaye was trying to get cocaine (Conversation 1D7). The day before Stolzenberg had called Kaye, who asked for a small amount of cocaine on the representation that he was "not doing it for myself" and wanted "the best because I'm gonna have a ton for you to do" (Conversation 1C4).

The following day Kaye said he "can't do it", (Conversation 2E7), but on July 31 Kaye offered to get "protection" for Steinberg and offered to introduce Steinberg to "the people who do it [cocaine] and then I walk away" (Conversation 2I8).

Finally, when arrested, Kaye falsely asserted that he spoke with Steinberg only in Steinberg's capacity as a customer of the insurance company for which Kaye worked (Tr. 433-437).

Viewing that evidence in the light most favorable to the Government, *United States* v. *Barash*, 412 F.2d 26, 31 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969), it was sufficient for the jury to conclude that Kaye, though wary of becoming involved, had nonetheless contacted his two cocaine sources in California but was unable to obtain the drug. Since it is basic to conspiracy law that a conspiracy need not succeed before the conspirators can be convicted, *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915), it would seem equally basic that an individual conspirator's efforts, so long as they are in furtherance of the conspiracy, need not succeed before ~~the conspirators~~ he can be convicted. Kaye was shown by the evidence to be a dealer in narcotics and a narcotics associate of Steinberg and of Stolzenberg, another narcotics dealer. When approached by Steinberg for assistance in securing cocaine for Agent Noone, Kaye extolled the quality of the cocaine he intended to get and attempted to consummate the transaction. No more is necessary. *United States* v. *Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973), *cert. denied*, 417 U.S. 930 (1974).

Kaye's attempt to analogize himself to an assortment of earlier successful appellants is not persuasive. His actual contact with two West Coast sources who were "calling back" to him, not to Steinberg, places him outside *United States* v. *Cianchetti,* 315 F.2d 584 (2d Cir. 1963), where a defendant did no more than discuss the subject of a conspiracy and his own reluctance to become involved in it. Nor was Kaye selling a lawful substance that was to be put by his customers to an unlawful use of which he had only a general awareness, with his only participation in a lawful transaction. *Cf. United States* v. *Falcone,* 109 F.2d 579 (2d Cir.), *aff'd,* 311 U.S. 205 (1940).* Nor did Kaye simply provide Steinberg with the name of someone from whom Steinberg might buy cocaine; the sources were Kaye's and it was he who contacted them. *Compare United States* v. *Hysohion,* 448 F.2d 343 (2d Cir. 1971). Finally, Kaye's rhetorical inquiry as to how this Court could reverse the conviction of a defendant in *United States* v. *Tramunti,* 513 F.2d 1087 (2d Cir. 1975), who had actually purchased two ounces of heroin for resale, while upholding Kaye's when no transaction was consummated (Kaye Brief at 16-17), misses the mark. In *Tramunti,* the Court reversed the conviction of a customer who in one transaction bought two ounces, which he did not fully pay for, from a conspiracy that dealt over several years in enormous quantities of drugs. That defendant's activities were, in this Court's view, "minuscule". 513 F.2d at 1112. Kaye, on the other hand, made an effort to get 50 pounds of cocaine, the sale of which was one of the main goals of the conspiracy. As this Court made clear in *United States* v. *Torres,* 503 F.2d 1120, 1124 (2d Cir. 1974), "it is the qualitative nature of the act or acts . . . [performed by a defendant] viewed in the context of the entire conspiracy

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* The Supreme Court in *Falcone* specifically left open, however, the question of whether such a transaction might constitute aiding and abetting.

which will determine whether an inference can be drawn as to the actors' knowledge of the scope of the conspiracy". By that standard, Kaye's attempted furtherance of a main goal of the conspiracy is sufficient.

The evidence amply supports the view that Kaye knowingly participated in the conspiracy, sought to make it succeed and used the telephone to further those efforts. No more is required to sustain his conviction under 21 U.S.C. Sections 846 and 843(b).

POINT V

The Government proved one conspiracy at trial; it it did not, Kaye and Parker were not prejudiced by the variance.

Kaye and Parker both urge that the Government proved more than one conspiracy at trial, and conclude that if they were involved in any conspiracy it was not the one alleged in the indictment. Each claims further that this alleged variance prejudiced substantial rights at trial, and asks that his conviction be reversed. Both claims are dubious and the relief unwarranted.

The proof showed that through cocaine sources in California Kaye tried to achieve one of the two major goals of the conspiracy—a 50-pound cocaine deal, and was aware through his conversations with Steinberg of the other—a transaction for "crystal" or PCP (Conversations 1D3, 1D4). Kaye by his own statements a narcotics dealer, was himself a buyer of smaller lots of cocaine for resale from David Stolzenberg (Conversation 1C4), another of Steinberg's cocaine sources. Moreover, Kaye showed at least substantial awareness of the full scope of Steinberg's dealing when he distinguished his own experience from Steinberg's: "Stuie, I've been dealing in the street much differently than you have for the last two years" (Conversation 1D4).

In the last conversation that included Kaye, Steinberg specifically alluded to a pending "big deal" in "quaalude, tuinals, seconals" and Kaye again cautioned Steinberg on the dangers in dealing in cocaine (Conversation 218).

Parker participated in hashish oil transactions with Steinberg, obtaining a quarter ounce of the drug in a transaction in which Steinberg shared and had a financial interest and negotiating for "another ounce" from his source, "Sam". The delivery of Parker's quarter ounce was at Steinberg's apartment, where "Sam" also had the telephone conversation with Parker about his purchase of an additional ounce (Conversations 1D10, 2D13, 1P1). Parker participated in these transactions and obtained credit from Steinberg with substantial awareness of the scope of Steinberg's dealing, and with specific awareness of at least the two transactions that were the major focus of Steinberg's efforts during this period—the transactions for 50 pounds of PCP and cocaine. In fact, after the first obstacles to those two transactions were encountered (Conversations 2C1, 2C10) Steinberg told Parker there was no "merchandise" to be had. "You mean of what you were talking to me about," Parker inquired. "Both", Steinberg replied, and later reiterated that though he had people "with a lot of money who want it," no deal could be done because, "Both sources dried up completely" (Conversation 1D1). In the same conversation Parker theorized that the shortage of drugs might be connected with "yesterday's bust," an observation that showed sufficient interest in and familiarity with the drug scene to indicate that Parker had knowledge beyond his relatively modest transaction, an indication confirmed later in the same conversation when he passed to Steinberg a message from "Mitchell" who had 17 of what Steinberg wanted and was expecting 10 more, to which Steinberg replied that he could not then get "Mitchell" what he wanted. Both references were clearly to drugs other than hashish oil, a drug sold by volume rather than by unit. Parker's general familiarity with drug traffic is some indi-

cation of his own involvement. *Cf. United States* v. *La Vecchia*, 513 F.2d 1210, 1219 (2d Cir. 1975). Further, Steinberg's quest for cocaine was not without incidental benefit to Parker. One of Steinberg's potential cocaine sources, Stephen Effron (Conversations 2N11, 2P2), asked Steinberg where he could get "oil" and was referred to Parker (Conversation 2P6).

Judge Ward charged the jury, as requested by Kaye (Kaye Request to Charge No. 7) that if "the Government failed to show the existence of the one overall agreement charged beyond a reasonable doubt but, rather, a number of separate agreements among the alleged co-conspirators, then you must acquit the defendants of the conspiracy charge" (Tr. 843). This instruction, on which a guilty verdict was returned, was, "if anything, more favorable to appellants than that to which they were entitled". *United States* v. *Sperling*, *supra*, 506 F.2d at 1341; *United States* v. *Bynum*, *supra*, 485 F.2d at 497.

For a defendant to be convicted of participating in a conspiracy, it is not necessary that he participate in all its aspects or know all its participants so long as he is aware of at least some of its basic aims and purposes. As to Kaye and Parker, "The question is whether the record contains sufficient facts from which the jury could infer their knowledge [of] the broader criminal enterprise involved in this case." *United States* v. *LaVecchia*, *supra*, 513 F.2d at 1219. See also *United States* v. *Santana*, 503 F.2d 710, 715 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974). It is not improper to join in one conspiracy two suppliers at different times of the same purchaser for resale, even when they never deal with one another. *United States* v. *Tramaglino*, 197 F.2d 928, 930 (2d Cir.), *cert. denied*, 344 U.S. 864 (1952). *Cf. United States* v. *Bruno*, 105 F.2d 921, 922-23 (2d Cir.), *reversed on other grounds*, 308 U.S. 287 (1939). In the case of a de-

fendant who engages in only one transaction, a charge of participation in a larger conspiracy is proper when the evidence, as here, justifies "an inference that [he] knew he was involved in a criminal enterprise of substantial scope." *United States* v. *DeNoia*, 451 F.2d 979, 981 (2d Cir. 1971). Such principles dispose of the multiple conspiracy claims of Kaye and Parker here.

Kaye and Parker urge strenuously that this case nonetheless represents a prosecution of the sort criticized in *United States* v. *Sperling*, *supra*, 506 F.2d at 1340-41 and *United States* v. *Miley*, *supra*. This observation is inaccurate. *Miley*, most similar to this case on its facts of the two cases relied upon, differs from this case in crucial respects. In *Miley*, as here, undercover agents with ostensibly unlimited funds and appetites for drugs approached Brandt and Miley, who then secured controlled substances of various sorts from three different groups of suppliers as "purchasing agents" for the undercover agents. The two supplier groups in the "right branches" of the criminal combination disclosed, were, this Court determined, not part of a single conspiracy with the supplier group in the "left branch", despite the fact that each branch dealt with Brandt and Miley. The basis for the Court's finding of two conspiracies was an absence of knowledge on the part of the left branch supply group of the existence of the right branch supply group, the fact that "the operations centered around Brandt and Miley could scarcely be attributed to any real organization, even a 'loose-knit' one", and that the "scope of this operation was defined only by Brandt's resourcefulness in securing new sources of controlled substances; but his known activities were not of such a scale that the defendants on the left of the Government's diagram must have known of the involvement of persons such as those on the right, and vice versa." 513 F.2d at 1206-1207.

This case is a far cry from *Miley*, as this recitation shows. Kaye and Parker were both specifically aware of

the fact that Steinberg was dealing in other drugs with other people. Each knew of the details of these other dealings, specifically the abortive cocaine and PCP transactions with Agent Noone, and each was familiar with some of the other participants; indeed Parker, the hashish oil supplier, knew Kaye, the cocaine dealer, and each knew of the other's illicit business relationship with Steinberg (Conversation 218). Similarly, while the rigidity of organization that this Court has found to exist in such cases as *United States* v. *Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974), is plainly absent here, it seems clear that Steinberg operated within a far more concrete drug network than did Brandt and Miley. In *Miley* Brandt's activities to supply the agents took the form of blazing trails in single transactions to new suppliers with whom Brandt and Miley appeared to have had no previous contact—Wenzler, Flores and Vavarigos; indeed, prior contacts with the "left branch" of the *Miley* drug network appears to have been limited to Godinsky, though his source was apparently continuously Goldstein. In this case, on the other hand, the intervention of the agents did no more than to expose an existing and steady relationship between Steinberg and numerous suppliers of various drugs—Kaye, Parker, Stolzenberg, Durst and Capo—to name a few.

Further, it is clear that even if more than one conspiracy is proved, a defendant must show that the variance "affect[ed] substantial rights". *United States* v. *Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963). See also *United States* v. *Miley*, *supra*, 513 F.2d at 1207-08. No such prejudice has been or could be shown here. There was no activity of any member of the conspiracy proven which was significantly more flagrant than that engaged in by any of the defendants except Steinberg, who would of course be a co-conspirator of each defendant, regardless of the number of conspiracies found. Similarly, the only hearsay statements that tended to establish the guilt of Kaye and Parker were statements by Stein-

berg, who was a co-conspirator of both on any view of the evidence. Thus, in furtherance of his efforts to secure drugs, and in order to advise a co-conspirator as to the progress of those efforts, Steinberg told Stolzenberg that Kaye was at work getting cocaine. See *United States* v. *Pardo-Bolland,* 348 F.2d 316, 324 (2d Cir.), *cert. denied,* 382 U.S. 944 (1965); *United States* v. *Annunziato,* 293 F.2d 373, 380 (2d Cir.), *cert. denied,* 368 U.S. 919 (1961).

Similarly, the most damaging evidence against Parker was his own conversations with Steinberg and "Sam" and the recommendation by Steinberg, Parker's co-conspirator in obtaining hashish oil, who helped consummate the transaction by exchanging the drug for the money and who helped finance the transaction (Conversations 2D13, 1P1), that Effron talk to Parker if he wanted "oil" (Conversation 2P6).

Moreover, Parker used his joinder* with Steinberg to his own advantage is summation, vigorously exploiting the contrast between his activities and Steinberg's (Tr. 749-778). The pattern of the jury's deliberations shows they had no trouble focusing on individual counts and defendants, and rebuts any claim that a "spillover effect" was at work here (Tr. 898-922, 940-942). Thus this case cannot reasonably be compared with *Kotteakos* v. *United States,* 328 U.S. 750 (1945), where a jury was asked to evaluate a series of identical transactions between one defendant and the others and decide whether they were fraudulent. To conclude that one was fraudulent would provide a near irresistible temptation to conclude they all were. In the case at bar the transactions were entered into at different times and under circumstances that varied

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* Parker claims also that the trial court erred in denying his severance motion. However, since he cannot show prejudice, he annot assert that the trial court abused its discretion in denying his motion. *United States* v. *Vega,* 458 F.2d 1234 (2d Cir. 1972), *cert. denied,* 410 U.S. 982 (1973).

as the conspirators encountered their various opportunities and obstacles. Moreover, unlike the jury in *Kotteakos*, this jury was not *told* there was one conspiracy but was asked whether or not there was and told to acquit if there was not (Tr. 843).

Nor would a jury at a separate trial of Kaye and his most immediate co-conspirators, or of Parker and his, have been protected from exposure to Steinberg's other escapades, both pharmaceutical and sexual. Whatever one's view of the evidence, Steinberg had to have been a co-defendant at any such trial, and evidence of his other activities would have been admissible to show the existence of the conspiracy and its scope. *United States* v. *Papadakis*, 510 F.2d 287, 295 (2d Cir. 1975), *cert. denied*, — U.S. —, 43 U.S.L.W. 3584 (April 28, 1975); *United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973). Moreover, Steinberg's defense was lack of intent, and the Government would have been fully entitled to prove Steinberg's other acts on the issue of intent. See, *e.g.*, *United States* v. *Brettholz*, 485 F.2d 483 (2d Cir. 1973); *United States* v. *Johnson*, 382 F.2d 280 (2d Cir. 1967); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). Further, it was Steinberg's counsel who insisted that the sexual references in the conversations not be deleted (Tr. 259-260). Thus the claims of prejudice by Kaye (Kaye Brief at 22-24) and Parker (Parker Brief at 23-26) are groundless, since they would have suffered essentially the same "prejudice" even if their "separate" conspiracies—Kaye's with at least Steinberg and Stolzenberg, and probably Capo, and Parker's with Steinberg and Werman—had been separately charged and tried.

Finally, it is not altogether without significance that the indictment in this case was filed almost a year before this Court's opinion in *Sperling, supra*, and that the case was tried before this Court's opinion in *Miley, supra*.

POINT VI

Parker's remaining arguments are without merit.

Parker claims the trial court erred in failing to charge the jury specifically that they must acquit if they find Parker purchased drugs for his own use rather than for resale. Never having requested such a charge, Parker cannot now raise the point, *United States* v. *Pinto,* 503 F.2d 718 (2d Cir. 1974); *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied,* 383 U.S. 907 (1966), and indeed the charge would have been properly rejected by the trial court, given the evidence, had Parker timely requested it. See *United States* v. *Marin,* 513 F.2d 974, 977 (2d Cir. 1975). In any event, the Court charged the jury that the conspiracy charged was to distribute or sell (Tr. 842). The word "distribute" was properly defined (Tr. 853).

Parker claims also that his conviction under Count 5 for violating 21 U.S.C. Section 843(b) cannot stand because it rests entirely on wiretap evidence. Such a conviction, he says, contravenes the intent of Congress. He contends that Senator Morse, the sponsor of 18 U.S.C. Section 1403, the predecessor of 21 U.S.C. Section 843(b), saw his measure as a substitute for authorizing wiretapping. However, Congress later authorized wiretapping. 18 U.S.C. Sections 2510-2520, and, still later, passed 21 U.S.C. Section 843(b). Senator Morse's original intention was never treated further by Congress. Parker's argument thus comes down to a claim that it would be inequitable to convict him based on evidence that would have offended the sponsor of the predecessor of the section under which he was convicted, who intended that predecessor as a substitute for authorizing wiretapping.

Not surprisingly, Parker advances no authority to support his position other than the history above described. Since the legislative histories of the particular statute that authorized the wiretap in this case and the particular statute that provided the basis for his conviction are devoid of support for Parker's argument, his claim must fail and, indeed, would fail even if Senator Morse's views had been codified in 18 U.S.C. Section 1084, merely from the enactment of 18 U.S.C. Sections 2510-2520 and 21 U.S.C. Section 843(b). See *Muniz* v. *Hoffman*, — U.S. —, 43 U.S.L.W. 4895 (June 25, 1975). Parker's claim also fails the test of common sense, for "the tapping of wires is particularly apposite where wire communication is an ingredient of the crime." *United States* v. *Leta*, *supra*, 332 F. Supp. at 1363.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL B. MUKASEY being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 3rd day of July 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States ~~Courthouse, Foley Square,~~ Borough of Manhattan, City of New York.
Attorney's Office - 1 St. Andrews Plaza

Michael B. Mukasey

Sworn to before me this
3rd day of July, 1975

Mary L. Avent

MARY L. AVENT
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Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977